

The Department authorizes wholesalers whose products are sold at retail by numerous distributors to assume responsibility for accounting and paying to the Department all tax accruing under the Retailers' Occupation Tax with respect to such sales. See, 86 Ill. Adm. Code 130.550 (this is a GIL).

December 6, 2000

Dear Xxxxx:

This letter is in response to your letter to PERSON, received on August 16, 2000. That letter has been forwarded to the Legal Services Office for response. We regret our delay in responding. The nature of your letter and the information that you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at www.revenue.state.il.us/legalinformation/regs/part1200.

In your letter, you announced COMPANY reorganization of its selling unit to BUSINESS, and submitted a new voluntary excise tax collection agreement (attached to your letter). You explained that you were applying for a new tax identification number with the Department's Business Registration Unit, and requested that the Department review and approve the collection agreement so that a smooth transition of payments could be made in December.

We have reviewed the "Voluntary Sales and Use Tax Collection Agreement ("Agreement")" which was attached to your letter. As a result of our review, we cannot consent to use of this Agreement in lieu of the Department's standard Agency Agreement. We have enclosed a copy of the Department's standard Agency Agreement for your review. Completed agency agreements should be sent to the Department's Central Registration Unit, to the attention of PERSON (Illinois Department of Revenue, P.O. Box 19030, Springfield, IL 62794-9030).

The Department's regulation governing agency agreements is found at 86 Ill. Adm. Code 130.550, enclosed. Before an agency agreement can be utilized, it must be "acceptable to the Department." Agency agreements allow companies to remit Retailers' Occupation Tax on behalf of participating distributors. Companies remit tax on their sales to distributors, based upon their suggested retail price of the items sold by their distributors. When companies enter into agency agreements with the Department, they become retailers subject to Retailers' Occupation Tax, and are the entities to which the Department will look for payment of the tax. We hope that the following comments illustrate why the Department is unable to consent to use of your Agreement.

1. Section 1 states that a sale is within a taxing jurisdiction if BUSINESS ships the product to a destination, based upon postal zip codes, within the taxing jurisdiction. Although in practice this

procedure may result in the correct application of local tax rates, the determination of local tax rates must be made in accordance with the provisions of 86 Ill. Adm. Code 270.115, enclosed.

2. Section 3 governs adjustments to tax, as in the case, for instance, of exempt sales, returned merchandise and other exemptions. When a retailer has erroneously collected tax, the retailer must follow the procedures established in Sections 6 through 6a of the Retailers' Occupation Tax Act regarding claims for credit. See also the enclosed copy of Sections 130.1501 and 130.1505, which explains these statutory provisions in greater detail. Please note that no claim may be filed by a vendor unless the vendor unconditionally refunds tax to the person who bore the burden of the tax (for example, an exempt entity such as a church possessing an exemption identification number). Unless tax is refunded to the customer who actually bore the burden of the tax, no claim can be granted. In order to document an exemption, a retailer must obtain documentation from the exempt purchaser to retain in his books and records to support the exemption. Section 3 of the Retailers' Occupation Tax Act also provides guidance regarding the manner in which returned merchandise adjustments are made. It states that "[r]efunds made by the seller during the preceding return period ... shall be allowed as a deduction under subdivision 5 of his monthly or quarterly return, as the case may be, in case the seller had theretofore included the receipts from the sale of such tangible personal property in a return filed by him and had paid the tax imposed by this Act with respect to such receipts."

Section 5 governs bad debts and uncollected tax. This section states that "BUSINESS shall not be liable or responsible for the payment of the taxes on sales where any IBO has, for any reason, failed to remit the tax due, provided the tax due was clearly indicated on the BUSINESS invoice." Similarly, Section 6 states that "BUSINESS is not a guarantor of the IBO's collection or the Customer's payment of their Tax obligations. BUSINESS shall be liable only to the extent it has actually collected the Tax from the IBO and not remitted such Tax to the Taxing Jurisdiction." Please be advised that the nature of an agency agreement is such that companies agree to remit Retailers' Occupation Tax on their sales to distributors based upon their suggested retail prices of items sold by distributors. The Department will therefore look to BUSINESS for liability on all sales made to distributors. Primary liability for such sales rests with BUSINESS, not distributors, in an agency agreement.

Section 8 governs nexus. It states that "the Taxing Jurisdiction recognizes that BUSINESS does not have sufficient contacts in the Taxing Jurisdiction to create "nexus" such that Taxing Jurisdiction could require BUSINESS to collect Taxes on sales at retail. The Taxing Jurisdiction also recognizes that the vast majority of BUSINESS's sales are sales for resale....In exchange, during the term of this Agreement, the Taxing Jurisdiction recognizes and shall not contest BUSINESS's lack of sales and use tax nexus or need to obtain a resale certificate from the IBOs." The Department cannot consent to these provisions. The determination of nexus is extremely fact dependent and best made after a Department representative has examined all facts and circumstances in a given situation. Similarly, we cannot agree that BUSINESS is not required to obtain resale certificates. If the company makes no retail sales, it is not required to obtain resale certificates from its customers. However, if it does make retail sales, it will be required to obtain Certificates of Resale on its sales to all customers, including distributors, in order to document the resale exemption. See, Dearborn Wholesale Grocers, Inc. v. Whittler (1980).

We hope that this letter clarifies some of the reasons why the Department is unable to consent to use of BUSINESS's Agreement. However, it is the Department's policy to enter into agency agreements, and for that purpose, it has developed a standard agency agreement. We encourage you to review our standard agreement to determine its feasibility for your company.

I hope that this information is helpful. If you have further questions concerning these matters, please feel free to contact me at the number listed above.

Very truly yours,

Jerilynn Gorden
Senior Counsel, Sales & Excise Tax

JTG/jg
Encl.